

THE HONORABLE JOHN H. CHUN

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

FEDERAL TRADE COMMISSION, *et al.*,

Plaintiffs,

v.

AMAZON.COM, INC., a corporation,

Defendant.

**CASE NO.: 2:23-cv-01495-JHC**

**PLAINTIFFS' MOTION TO  
COMPEL PRODUCTION OF  
DOCUMENTS**

NOTE ON MOTION CALENDAR:

November 26, 2024

**FILED UNDER SEAL**

**TABLE OF CONTENTS**

LEGAL STANDARD.....	2
ARGUMENT.....	3
I.    THE COURT SHOULD ORDER AMAZON TO PRODUCE RELEVANT PERSONNEL REVIEW, EVALUATION, AND PROMOTION MATERIALS FROM ITS CENTRAL REPOSITORY. ....	3
II.   THE COURT SHOULD ORDER AMAZON TO PRODUCE DOCUMENTS REGARDING ITS RESPONSES TO FOREIGN INVESTIGATIONS AND REGULATIONS AND COMMUNICATIONS WITH FOREIGN COMPETITION ENFORCERS. ....	7
A.   DOCUMENTS CONCERNING AMAZON’S RESPONSES TO FOREIGN INVESTIGATIONS AND REGULATIONS.....	8
B.   DOCUMENTS AMAZON PROVIDED TO FOREIGN COMPETITION ENFORCERS .....	12
C.   RELATED SEARCH TERMS .....	14
CONCLUSION.....	15

## TABLE OF AUTHORITIES

### Cases

<i>Blankenship v. Hearst Corp.</i> , 519 F.2d 418 (9th Cir. 1975) .....	3
<i>Doe v. Trump</i> , 329 F.R.D. 262 (W.D. Wash. 2018) .....	3
<i>Epic Games, Inc. v. Apple, Inc.</i> , 67 F.4th 946 (9th Cir. 2023) .....	9, 12
<i>Epic Games, Inc. v. Apple, Inc.</i> , No. 20-cv-05640 (N.D. Cal. July 19, 2024), Dkt. #1008.....	11
<i>Floyd v. Amazon</i> , No. 22-cv-01599 (W.D. Wash. Sept. 9, 2024), Dkt. #138.....	13
<i>Frame-Wilson v. Amazon.com, Inc.</i> , 2023 WL 4201679 (W.D. Wash. June 27, 2023).....	1, 3, 7
<i>Garner v. Amazon.com, Inc.</i> , 2023 WL 6038011 (W.D. Wash. Sept. 15, 2023).....	1, 2
<i>In re Apple iPhone Antitrust Litig.</i> , No. 4:11-cv-06714 (N.D. Cal. Aug. 19, 2024), Dkt. #919 .....	8, 11
<i>In re Exactech Polyethylene Orthopedic Prod. Liab. Litig.</i> , 2024 WL 4381076 (E.D.N.Y. Oct. 3, 2024).....	13
<i>In re Google Play Store Antitrust Litigation</i> , 21-md-02981 (N.D. Cal. April 11, 2024), Dkt. #952-1 .....	11
<i>In re Plastics Additives Antitrust Litig.</i> , 2004 WL 2743591 (E.D. Pa. Nov. 29, 2004) .....	8, 13
<i>Moya v. City of Clovis</i> , 2019 WL 4193427 (D.N.M. Sept. 3, 2019) .....	6
<i>Sali v. Corona Reg'l Med. Ctr.</i> , 884 F.3d 1218 (9th Cir. 2018) .....	2
<i>Smith v. Legacy Partners Inc.</i> , 2022 WL 1194125 (W.D. Wash. Apr. 21, 2022).....	2
<i>Soto v. City of Concord</i> , 162 F.R.D. 603 (N.D. Cal. 1995).....	2
<i>United States ex rel. Krahling v. Merck &amp; Co.</i> , 2016 WL 7042203 (E.D. Pa. Feb. 5, 2016) .....	4
<i>United States v. Google LLC</i> , No. 20-cv-03010 (D.D.C. June 29, 2021), Dkt. #151.....	4, 6
<i>United States v. Google LLC</i> , No. 20-cv-03010 (D.D.C. Aug. 27, 2021), Dkt. #189 .....	4
<i>United States v. Microsoft Corp.</i> , 253 F.3d 34 (D.C. Cir. 2001) (en banc) .....	10

*Whitman v. State Farm Life Ins. Co.*,  
2020 WL 5526684 (W.D. Wash. Sept. 15, 2020)..... 3

**Rules**

Fed. R. Civ. P. 26(b) ..... 1, 2, 12, 14

1 Plaintiffs “may obtain discovery regarding any nonprivileged matter that is relevant to  
2 any party’s claim or defense and proportional to the needs of the case.” Fed. R. Civ. P. 26(b)(1).  
3 This is a major government antitrust enforcement action involving allegations of long-running  
4 anticompetitive conduct by Amazon—one of the largest companies in the world. Yet Amazon  
5 refuses to produce key documents relating to custodians’ personnel reviews, documents  
6 regarding remedial measures Amazon has taken in response to similar challenges by foreign  
7 competition enforcers, or even materials exchanged with those enforcers. Amazon has already  
8 been cautioned by a court in this District for taking an “unreasonably narrow view of what [is]  
9 relevant” and for failing, in responding to discovery requests, to “accurately capture the scope of  
10 plaintiffs’ claims or the breadth of this litigation.” *Garner v. Amazon.com, Inc.*, 2023 WL  
11 6038011, at \*3-4 (W.D. Wash. Sept. 15, 2023). Amazon should not be permitted to do the same  
12 here.

13 Amazon has not shown, and cannot show, that any of the discovery requests at issue in  
14 this motion are unduly burdensome. *See* Fed. R. Civ. P. 26(b)(1). Amazon’s anticompetitive  
15 conduct affects tens of millions of American households, hundreds of thousands of sellers on  
16 Amazon, and hundreds of billions of dollars in commerce every year. Judge Martinez recognized  
17 that the related *Frame-Wilson* action “is a significant, substantial case,” and that discovery  
18 should be commensurate with the importance of the case. *Frame-Wilson v. Amazon.com, Inc.*,  
19 2023 WL 4201679, at \*4 (W.D. Wash. June 27, 2023). Those considerations are even stronger  
20 here, in a government enforcement action challenging a broader range of Amazon’s  
21 anticompetitive conduct. Amazon is one of the largest and most technically sophisticated  
22 companies in the world. Any incremental discovery burden on Amazon associated with the  
23  
24

disputes presented in this motion is proportional to the needs of the case. To quote Amazon itself: “We are big, we impact the world.”<sup>1</sup> Discovery must scale accordingly.

### **LEGAL STANDARD**

The scope of discovery under Rule 26(b) is “extremely broad.” *Soto v. City of Concord*, 162 F.R.D. 603, 610 (N.D. Cal. 1995); *see also Garner*, 2023 WL 6038011, at \*1 (“Relevance under Rule 26(b)(1) is defined broadly and remains so even after the 2015 amendments of the Federal Rules of Civil Procedure.”). The parties may obtain discovery of “any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.” Fed. R. Civ. P. 26(b)(1). As courts in this District and Circuit have emphasized, relevance “should be ‘construed liberally and with common sense, and discovery should be allowed unless the information sought has no conceivable bearing on the case.’” *Smith v. Legacy Partners Inc.*, 2022 WL 1194125, at \*4 (W.D. Wash. Apr. 21, 2022) (quoting *Soto*, 162 F.R.D. at 610)).

When addressing burden or proportionality objections, Federal Rule of Civil Procedure 26(b)(1) directs courts to consider “whether the burden or expense of the proposed discovery outweighs its likely benefit,” taking into consideration “the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, [and] the importance of the discovery in resolving the issues.”

When a party fails to produce requested documents or other materials, “Federal Rule of Civil Procedure 37 allows a party to move for an order compelling disclosures or discovery.” *Sali v. Corona Reg’l Med. Ctr.*, 884 F.3d 1218, 1219 (9th Cir. 2018). Once the moving party has made a minimal showing of relevance, the party opposing discovery “has the burden to show that

---

<sup>1</sup> Amazon Leadership Principles, Amazon.com, Inc., <https://www.aboutamazon.com/about-leadership-principles> (last visited Nov. 4, 2024).

discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections with competent evidence.” *Doe v. Trump*, 329 F.R.D. 262, 270 (W.D. Wash. 2018) (internal citations and quotations omitted); *see also Whitman v. State Farm Life Ins. Co.*, 2020 WL 5526684, at \*2 (W.D. Wash. Sept. 15, 2020) (“The Ninth Circuit has held that there are ‘liberal discovery principles’ under the Federal Rules and that the party resisting discovery thus carries a ‘heavy burden of showing’ why a request for discovery should be denied.” (quoting *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975))); *Frame-Wilson*, 2023 WL 4201679, at \*2, \*4.

### ARGUMENT

#### **I. THE COURT SHOULD ORDER AMAZON TO PRODUCE RELEVANT PERSONNEL REVIEW, EVALUATION, AND PROMOTION MATERIALS FROM ITS CENTRAL REPOSITORY.**

Plaintiffs’ RFP No. 32 seeks “[a]ll Documents relating to personnel reviews, evaluations, and promotion materials (whether in draft or final form) concerning individuals with responsibilities relating to the conduct described in the Complaint,” including individuals in specified business groups. Baker Decl., Ex. A at 11-12.<sup>2</sup> Amazon has committed to “produce any personnel review found in custodial files that hit on Plaintiffs’ search terms and [is] deemed responsive for their substantive requests,” Dkt. #273 at 38, Joint Status Report at 38 (Aug. 28, 2024) (“August 28, 2024 JSR”), but has refused to produce documents held in [REDACTED] [REDACTED] Ex. B at 3; Ex. C at 2; Ex. D at 1, 4 ([REDACTED]). Plaintiffs have proposed that Amazon “collect and produce personnel reviews, evaluations, and promotion materials from its centralized repository for all document

<sup>2</sup> Citations to “Ex. \_\_” refer to exhibits attached to the Declaration of Michael Baker (Dkt. #332).

1 custodians agreed upon by the parties or ordered by the Court.” August 28, 2024 JSR at 23.  
2 Amazon has refused to do so, on the grounds that materials sought by this request “are not  
3 themselves relevant to any allegation in Plaintiffs’ Complaint” and the request is unduly  
4 burdensome. Ex. C at 2.

5 The personnel reviews, evaluations, and promotion materials Plaintiffs seek will provide  
6 important information regarding Amazon’s competitive strategies and business goals, and shed  
7 light on the responsibilities, knowledge, and credibility of the Amazon employees closest to the  
8 conduct at issue in this case. Such information is central to any antitrust case; accordingly,  
9 performance evaluations are commonly produced and used in antitrust litigation. *See, e.g.*, Joint  
10 Status Report at 7-8, *United States v. Google LLC*, No. 20-cv-03010 (D.D.C. Aug. 27, 2021),  
11 Dkt. #189 (citing *United States v. Am. Express Co.*, No. 10-cv-4496 (E.D.N.Y. 2014), *United*  
12 *States v. Aetna Inc.*, No. 16-cv-1494 (D.D.C. 2016), and *United States v. Sabre Corp.*, No. 19-  
13 cv-1548 (D. Del. 2020)); *see also* Hr’g Tr. at 29:8-23, *United States v. Google LLC*, No. 20-cv-  
14 03010 (D.D.C. June 29, 2021), Dkt. #151 (recognizing that performance evaluations are  
15 “unique” materials that provide “an interesting insight and window into the thinking of the  
16 assessor in terms of reflecting on the work that they’ve done and how they think that benefited  
17 the company”); *id.* at 32:18-24 (ordering production for deposition witnesses); *United States ex*  
18 *rel. Krahling v. Merck & Co.*, 2016 WL 7042203, at \*3 (E.D. Pa. Feb. 5, 2016) (noting  
19 performance reviews were relevant to assess the credibility of witnesses’ testimony).

20 Amazon’s argument that personnel materials are not relevant to this case is contradicted  
21 by the limited personnel materials Amazon produced in Plaintiffs’ pre-Complaint investigation.

22 For example, a request to promote [REDACTED]

23 [REDACTED] described  
24

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED] Ex. E, Amazon-FTC-CID\_07679127  
4 at -127, -130. Those efforts, and Amazon's intent to "[REDACTED]" are  
5 relevant to Plaintiffs' allegations that Amazon has profitably degraded the quality of its search  
6 results by cluttering organic search results with expensive, irrelevant advertisements. *See* SAC  
7 ¶¶ 231-42 (Dkt. #327). In another example, a promotion memo for [REDACTED]  
8 [REDACTED] highlights that [REDACTED]  
9 [REDACTED]—all of which are relevant to Amazon's ability to profitably hike seller  
10 fees without losing meaningful business, *see* SAC ¶¶ 251-58 (Dkt. #327)—and notes that  
11 "[REDACTED]  
12 [REDACTED]" Ex. F, Amazon-FTC-  
13 CID\_02265294 at -296. And a promotion request for [REDACTED]  
14 [REDACTED] identified him as "[REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]" Ex. G, Amazon-FTC-CID\_01916541 at -550-51. As the promotion document explains,  
18 the [REDACTED]  
19 [REDACTED] *id.* at -542; accordingly, materials assessing [REDACTED] work are squarely  
20 relevant to Plaintiffs' anti-discounting allegations. *See, e.g.,* SAC ¶ 265 (Dkt. #327). All three  
21 individuals are agreed-upon custodians.

22 Amazon has argued that a non-custodial collection in response to RFP No. 32 is  
23 unnecessary because relevant personnel reviews will be produced if they are captured by  
24

1 Amazon’s search and review of custodial documents. *See* August 28, 2024 JSR at 39. This  
2 approach fails to address Amazon’s admission that custodians generally do not have access to  
3 their own personnel review, evaluation, and promotion materials. *See id.* at 22. Amazon also has  
4 not retained emails and other documents for all custodians. *See, e.g.,* Ex. H. A collection from  
5 Amazon’s centralized repository is thus necessary to ensure that personnel materials for  
6 custodians—including custodians who may be deponents and trial witnesses—are produced.

7       The burden associated with producing these documents is minimal. Amazon has made no  
8 showing and offered no specific arguments that the burden of producing personnel review,  
9 evaluation, and promotion materials for the carefully negotiated set of custodians outweighs their  
10 clear relevance to the case. Nor can it. Any burden associated with producing documents in  
11 response to this request is minimal given that there is a centralized repository housing these  
12 materials. *See* Hr’g Tr. at 28:9-29:6, 30:21-31:1, *United States v. Google LLC*, No. 20-cv-03010  
13 (D.D.C. June 29, 2021), Dkt. #151 (court noting that, where personnel materials are stored in a  
14 central repository, “the burden of obtaining them is relatively modest”). And producing these  
15 materials will economize discovery by allowing Plaintiffs to efficiently target and prioritize  
16 custodians for depositions.

17       Amazon’s concerns about the “sensitivity” of these files are not a basis to limit discovery.  
18 *See* August 28, 2024 JSR at 39. Amazon has not claimed or shown that the documents housed in  
19 its central repository are more sensitive than the personnel documents it has agreed to produce  
20 from custodial files. Moreover, any confidentiality concerns are fully addressed by the Protective  
21 Order. *See* Protective Order ¶ 4.1 (Dkt. #160); *see also Moya v. City of Clovis*, 2019 WL  
22 4193427, at \*3 (D.N.M. Sept. 3, 2019) (recognizing the appropriate remedy to protect sensitive  
23 information in personnel files is a protective order).

**II. THE COURT SHOULD ORDER AMAZON TO PRODUCE DOCUMENTS REGARDING ITS RESPONSES TO FOREIGN INVESTIGATIONS AND REGULATIONS AND COMMUNICATIONS WITH FOREIGN COMPETITION ENFORCERS.**

Through three related RFPs, Plaintiffs have requested documents relating to (1) Amazon actions in response to related competition investigations in foreign jurisdictions; (2) Amazon actions in response to three competition regulations in specific foreign jurisdictions; and (3) communications with foreign competition enforcers. These requests are designed to enable comparisons that may illuminate the purpose and effect of Amazon's conduct in the United States. Amazon's responses to related investigations or competition regulations in foreign jurisdictions may, for example, shed light on the validity of Amazon's asserted procompetitive justifications in the United States. Similarly, remedial actions Amazon has taken or evaluated in foreign markets may inform whether less restrictive alternatives are available here. Finally, while this case is broader than any foreign competition investigation Plaintiffs are aware of, remedies imposed or agreed to in other jurisdictions may provide information relevant to potential remedies here.

Amazon has refused to provide this relevant information, even though the company can produce these documents with minimal burden: Plaintiffs are not seeking any additional custodians in connection with these requests and are only requesting a limited set of additional search terms.

Courts generally permit discovery into foreign practices and production of materials shared with foreign enforcers, particularly in the antitrust context, where foreign conduct provides points of comparison for anticompetitive conduct in the United States. *See, e.g., Frame-Wilson*, 2023 WL 4201679, at \*3 (finding production of foreign data permissible for "comparative analyses"); Order at 4-6, *In re Apple iPhone Antitrust Litig.*, No. 4:11-cv-06714 (N.D. Cal. Aug.

1 19, 2024), Dkt. #919 (ordering production of Apple’s foreign regulatory responses as relevant to  
2 purported pro-competitive justifications). Further, documents produced to foreign enforcers are  
3 routinely produced by defendants in antitrust matters. *See, e.g., In re Plastics Additives Antitrust*  
4 *Litig.*, 2004 WL 2743591, at \*13-14 (E.D. Pa. Nov. 29, 2004) (ordering production of documents  
5 “produced to foreign investigatory authorities”).

6 **A. Documents Concerning Amazon’s Responses to Foreign Investigations and**  
7 **Regulations**

8 Plaintiffs’ RFP Nos. 376 and 377 call for documents relating to “Amazon’s actions . . .  
9 undertaken or considered as the result of any investigation or inquiry by any government  
10 competition enforcer in any country or jurisdiction” (RFP No. 376), or actions “undertaken or  
11 considered as the result of requirements consistent with [Amazon’s] designation under any  
12 regulatory scheme . . . as a gatekeeper, platform with strategic market status, or similar  
13 designation” (RFP No. 377). Ex. I at 49-52. Plaintiffs have narrowed the latter request to the  
14 European Union’s Digital Markets Act; the United Kingdom’s Digital Markets, Competition,  
15 and Consumers Bill; and Section 19(e) of Germany’s Competition Act. Ex. J at 17. Plaintiffs  
16 offered to consider narrowing RFP No. 376 to address Amazon’s expressed concern that not  
17 every antitrust investigation into Amazon’s conduct might be relevant, and asked Amazon to  
18 provide a list of investigations in other jurisdictions to further discussions. *Id.* Amazon refused  
19 to provide that information. Ex. K at 13.

1 Plaintiffs are aware of public investigations in at least the European Union,<sup>3</sup> United  
 2 Kingdom,<sup>4</sup> Germany,<sup>5</sup> and Japan,<sup>6</sup> among others, that involve conduct similar to the conduct at  
 3 issue in this case. Authorities in the European Union and the United Kingdom investigated  
 4 Amazon's selection of sellers eligible for the Buy Box, which is part of the Amazon anti-  
 5 discounting conduct Plaintiffs challenge here. *See* SAC ¶¶ 271-287 (Dkt. #326). Authorities in  
 6 Germany and Japan investigated Amazon's use of contractual price parity terms. Amazon  
 7 engaged in the same practice in the United States, *id.* ¶ 274, and continues to use SC-FOD to  
 8 enforce the same "expectations and policies," *id.* ¶¶ 276-278. There may be other related non-  
 9 public investigations that are known to Amazon but not Plaintiffs.

10 Documents showing how Amazon changed its conduct, or considered changing its  
 11 conduct, in response to foreign competition investigations or laws bear on two key aspects of an  
 12 antitrust case: (1) whether Amazon's purported "procompetitive efficiencies could be  
 13 reasonably achieved through less anticompetitive means," *Epic Games, Inc. v. Apple, Inc.*, 67  
 14 F.4th 946, 990 (9th Cir. 2023) (explaining rule of reason framework); *see also United States v.*

16 <sup>3</sup> European Commission, *CASE AT.40462 - Amazon Marketplace and AT.40703 – Amazon Buy*  
 17 *Box 5* (2022),  
 18 [https://ec.europa.eu/competition/antitrust/cases1/202310/AT\\_40703\\_8990760\\_1533\\_5.pdf](https://ec.europa.eu/competition/antitrust/cases1/202310/AT_40703_8990760_1533_5.pdf)  
 19 (investigation and decision regarding "the conditions and criteria that govern the selection of the  
 20 offer that features in the 'Buy Box'").

19 <sup>4</sup> Competition & Markets Authority, *Decision to accept binding commitments under the*  
 20 *Competition Act 1998 from Amazon in relation to conduct on its UK online marketplace* 10  
 21 (2023), [https://assets.publishing.service.gov.uk/media/6544cbaed36c91000d935d20/Non-](https://assets.publishing.service.gov.uk/media/6544cbaed36c91000d935d20/Non-confidential_decision_pdfa_4.pdf)  
 22 [confidential\\_decision\\_pdfa\\_4.pdf](https://assets.publishing.service.gov.uk/media/6544cbaed36c91000d935d20/Non-confidential_decision_pdfa_4.pdf) (investigating Amazon's criteria for selecting Featured Offers  
 23 in the Buy Box).

21 <sup>5</sup> Bundeskartellamt, *Case Report: Amazon removes price parity obligation for retailers on its*  
 22 *Marketplace platform* (2013),  
 23 [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2013/](https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2013/B6-46-12.pdf?__blob=publicationFile&v=2)  
 24 [B6-46-12.pdf?\\_\\_blob=publicationFile&v=2](https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2013/B6-46-12.pdf?__blob=publicationFile&v=2) (investigating Amazon's price parity agreement).

23 <sup>6</sup> Japan Fair Trade Commission, *Closing the Investigation on the Suspected Violation of the*  
 24 *Antimonopoly Act by Amazon Japan G.K.* at ¶ 6(iv) (2017),  
[https://www.jftc.go.jp/en/pressreleases/yearly-2017/June/170601\\_files/170601-2.pdf](https://www.jftc.go.jp/en/pressreleases/yearly-2017/June/170601_files/170601-2.pdf) (Amazon  
 proposed voluntary measures to address concerns regarding Amazon's price parity clauses).

1 *Microsoft Corp.*, 253 F.3d 34, 58-59 (D.C. Cir. 2001) (en banc); and (2) whether these changes  
2 were effective at remedying the anticompetitive effects of Amazon's conduct.

3 For example, public sources indicate that Amazon proposed voluntary measures to  
4 address concerns raised by the Japan Fair Trade Commission (JFTC) about the anticompetitive  
5 effects of Amazon's price parity clauses. *See supra* note 6 at ¶¶ 5–6. Amazon has also begun  
6 implementing commitments it made to the European Commission under the supervision of a  
7 trustee appointed in February 2023.<sup>7</sup> Documents showing what those voluntary measures were,  
8 how Amazon implemented them, and their effects, if any—as detailed in the annual report  
9 Amazon was ordered to file as part of its agreement to close the JFTC's investigation, *id.* at  
10 ¶ 6(iv), among other sources—may contain information relevant to potential alternatives to the  
11 policies and practices Plaintiffs are challenging in this case.

12 The limited materials related to foreign competition proceedings that Amazon has  
13 produced to date further indicate that Amazon has changed some of its conduct in response to  
14 foreign competition investigations. For example, [REDACTED]

15 [REDACTED]  
16 [REDACTED] *See* Ex. L, AMZN-RTL-FTC-02635813 at -816.

17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED] *Id.* Approximately five  
20 months later, the European Commission resolved its investigation into Amazon's  
21 anticompetitive conduct [REDACTED]

22 \_\_\_\_\_  
23 <sup>7</sup> Amazon's Commitments to the European Commission, ALCIS, [https://www.alcis-](https://www.alcis-advisers.com/#amazons-commitments-to-the-european-commission)  
24 [advisers.com/#amazons-commitments-to-the-european-commission](https://www.alcis-advisers.com/#amazons-commitments-to-the-european-commission) (last visited Nov. 5, 2024).

1 [REDACTED] See *supra* note 3 at 43–45; see also Ex. M, Amazon-  
2 FTC-CID\_04140046 at -056 ([REDACTED])  
3 [REDACTED]  
4 [REDACTED]).

5 The relevance of a defendant’s foreign conduct has been recognized in several recent  
6 antitrust cases. In *Epic Games, Inc. v. Apple, Inc.*, the court ordered discovery into Apple’s  
7 reactions to investigations and regulations in foreign jurisdictions to understand its response to a  
8 potential injunction in the United States. See Discovery Order re Dkt. Nos. 1000, 1002, 1003,  
9 No. 20-cv-05640 (N.D. Cal. July 19, 2024), Dkt. #1008 at 2. In *In re Google Play Store*  
10 *Antitrust Litigation*, Plaintiffs’ expert cited Google’s alleged evasion of Korean law as a reason  
11 why specific remedies were needed to avoid similar evasion in the United States. See Statement  
12 of B. Douglas Bernheim at 2 n.6, 21-md-02981 (N.D. Cal. April 11, 2024), Dkt. #952-1. And in  
13 *In re Apple iPhone Antitrust Litigation*, the court agreed that materials related to “Apple’s  
14 responses to the European Union’s Digital Markets Act” were relevant because they “may show  
15 that Apple’s pro-competitive justifications . . . are not as important as Apple says they are.”  
16 Order at 4-6 (N.D. Cal. Aug. 19, 2024), Dkt. #919. Here, similarly, discovery into Amazon’s  
17 responses to foreign investigations and competition regulations will provide relevant  
18 information.

19 Plaintiffs are not seeking any additional custodians in connection with these requests.  
20 Plaintiffs are requesting only that Amazon be ordered to produce any responsive documents  
21 held in centralized locations, and any responsive documents captured by Amazon’s search of  
22 custodial documents for agreed-upon custodians. Plaintiffs have proposed a targeted set of  
23  
24

1 additional search terms to capture materials responsive to RFP Nos. 376 and 377. *See infra*  
2 Section III.C.

3 Amazon has not made any specific showing of burden associated with these RFPs and  
4 cannot show that the “burden or expense of the proposed discovery outweighs its likely benefit,”  
5 Fed. R. Civ. P. 26(b)(1). While Plaintiffs have attempted to engage with Amazon to navigate any  
6 burden, Amazon has wholesale refused to engage. Ex. K at 12-13. Plaintiffs accordingly request  
7 that the Court order Amazon to search for and produce documents in response to RFP Nos. 376  
8 and 377.

9 **B. Documents Amazon Provided to Foreign Competition Enforcers**

10 Plaintiffs’ RFP No. 387 calls for materials “received from and provided to any  
11 government competition enforcer in any country or jurisdiction in connection with an antitrust or  
12 competition-related investigation or inquiry.” Ex. I at 62. As with RFP No. 376, Plaintiffs  
13 offered to narrow the scope of this request if Amazon would provide a list of antitrust  
14 investigations for Plaintiffs’ review; Amazon refused to do so. Ex. K at 12-13.

15 As discussed *supra*, any documents Amazon sent to foreign competition enforcers in  
16 connection with investigations into conduct that is similar or related to the conduct challenged in  
17 this case are likely to contain information that is relevant to this case, including information  
18 about Amazon’s operations and business decisions and potential changes to or alternatives to  
19 Amazon’s conduct—all of which would be relevant at least to whether Amazon’s purported  
20 “procompetitive efficiencies could be reasonably achieved through less anticompetitive means.”  
21 *See Epic*, 67 F.4th at 990. Documents Amazon received from those enforcers will provide  
22 necessary context for Amazon’s responses.

23 Communications and documents shared with government enforcers are regularly  
24 produced in discovery, particularly in antitrust cases. Such discovery occurs often as “defendants

1 in antitrust litigation regularly agree through joint discovery schedules to produce documents  
2 submitted to . . . investigatory authorities concerning the basis for the antitrust civil suit.” *In re*  
3 *Plastics Additives Antitrust Litig.*, 2004 WL 2743591, at \*12. Where the allegations at issue in a  
4 case overlap with a government investigation, the burden to produce documents is often low and  
5 proportionality weighs in favor of production, as these materials already exist and often are  
6 easily collectible. *See id.* (finding “minimum burden” associated with the production of  
7 documents provided to government enforcers). The relevance of documents submitted to  
8 government enforcers does not change solely because the materials were provided to a foreign  
9 enforcer. *See In re Exactech Polyethylene Orthopedic Prod. Liab. Litig.*, 2024 WL 4381076, at  
10 \*5 (E.D.N.Y. Oct. 3, 2024) (“Courts generally permit discovery of documents and  
11 communications from foreign agencies when the requests are narrowed to specific countries,  
12 regulatory agencies, or subject areas.”).

13 *Floyd v. Amazon* is not to the contrary. There, the court rejected the plaintiffs’ request for  
14 documents submitted to Italian and Spanish competition regulators as speculative, because it  
15 found that the plaintiffs did not articulate a clear use for the documents. *See Floyd v. Amazon*,  
16 No. 22-cv-01599 (W.D. Wash. Sept. 9, 2024), Dkt. #138 at 6. The plaintiffs argued that these  
17 materials were helpful to compare the positions Amazon had taken in “analogous proceedings”  
18 but did not show that the investigations were “meaningfully analogous” to their case. *Id.* By  
19 contrast, Plaintiffs here have shown that certain investigations they are aware of involve some of  
20 the same conduct Plaintiffs allege is anticompetitive, and have identified concrete areas of  
21 overlap for each investigation, along with the relevance of these overlaps to this case. *See supra*  
22 notes 3–6. Moreover, the scope of these investigations is not necessarily limited to the foreign  
23 jurisdictions in question; in some cases, foreign competition enforcers [REDACTED]

1 [REDACTED]. See Ex. N, AMAZON-FTC\_00016721 at -726

2 ([REDACTED])

3 [REDACTED]

4 [REDACTED]; *id.* at -727 ([REDACTED])

5 [REDACTED]

6 [REDACTED]). Plaintiffs should be allowed to obtain information Amazon has provided to

7 other enforcers about conduct related to or similar to the conduct at issue in this case, and

8 certainly should be allowed to see what representations Amazon has made about its conduct and

9 operations in the United States.

10 Plaintiffs are not seeking any additional custodians or search terms for this request.

11 Plaintiffs are requesting only that Amazon be ordered to produce any responsive documents held

12 in centralized locations, and any responsive documents otherwise captured by Amazon's search

13 of custodial documents.

14 Amazon has not made any specific showing of burden associated with this RFP and

15 cannot show that the "burden or expense of the proposed discovery outweighs its likely benefit."

16 Fed. R. Civ. P. 26(b)(1). Plaintiffs accordingly request that the Court order Amazon to search for

17 and produce documents in response to RFP No. 387.

### 18 C. Related Search Terms

19 In connection with RFP Nos. 376 and 377, the Court should order Amazon to run a

20 narrow set of additional search terms designed to capture the names of foreign competition

21 enforcers and regulations. See Appx. A (listing search terms and Amazon's most recent hit

22 counts provided for those terms); Ex O. Amazon has refused to provide Plaintiffs with

23 information about foreign investigations that would allow Plaintiffs to narrow these search

terms—such as, for instance, a list of foreign investigations into Amazon’s conduct or case numbers. Amazon has also not made any counterproposals regarding search terms. Plaintiffs accordingly request that the Court order Amazon to run the search terms Plaintiffs have proposed.

### **CONCLUSION**

For the reasons above, the Court should grant Plaintiffs’ motion and order Amazon to (1) produce documents responsive to RFP No. 32; (2) produce documents responsive to RFP Nos. 376, 377, and 387; and (3) run the search terms identified in Appendix A.

Dated: November 5, 2024

*I certify that this brief contains 4,196 words, in compliance with the Local Civil Rules*

Respectfully submitted,

*s/Michael Baker*

SUSAN A. MUSSER (DC Bar # 1531486)  
EDWARD H. TAKASHIMA (DC Bar # 1001641)  
MICHAEL BAKER (DC Bar # 1044327)  
AMANDA L. BUTLER (IL Bar # 6299218)  
J. WELLS HARRELL (DC Bar # 995368)  
COLIN M. HERD (NY Reg. # 5665740)  
BAHADUR S. KHAN (NY Reg. # 5370705)  
SHIRA STEINBERG (NY Reg. # 5695580)

Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580  
Tel.: (202) 326-2122 (Musser)  
(202) 326-2464 (Takashima)  
Email: smusser@ftc.gov  
etakashima@ftc.gov  
mbaker1@ftc.gov  
abutler2@ftc.gov  
jharrell@ftc.gov  
cherd@ftc.gov  
bkhan1@ftc.gov  
ssteinberg1@ftc.gov

*Attorneys for Plaintiff Federal Trade Commission*

s/ Michael Jo

Michael Jo (admitted *pro hac vice*)  
Assistant Attorney General, Antitrust Bureau  
New York State Office of the Attorney  
General  
28 Liberty Street  
New York, NY 10005  
Telephone: (212) 416-6537  
Email: Michael.Jo@ag.ny.gov  
*Counsel for Plaintiff State of New York*

s/ Rahul A. Darwar

Rahul A. Darwar (admitted *pro hac vice*)  
Assistant Attorney General  
Office of the Attorney General of Connecticut  
165 Capitol Avenue  
Hartford, CT 06016  
Telephone: (860) 808-5030  
Email: Rahul.Darwar@ct.gov  
*Counsel for Plaintiff State of Connecticut*

s/ Alexandra C. Sosnowski

Alexandra C. Sosnowski (admitted *pro hac vice*)  
Assistant Attorney General  
Consumer Protection and Antitrust Bureau  
New Hampshire Department of Justice  
Office of the Attorney General  
One Granite Place South  
Concord, NH 03301  
Telephone: (603) 271-2678  
Email: Alexandra.c.sosnowski@doj.nh.gov  
*Counsel for Plaintiff State of New Hampshire*

s/ Robert J. Carlson

Robert J. Carlson (admitted *pro hac vice*)  
Assistant Attorney General  
Consumer Protection Unit  
Office of the Oklahoma Attorney General  
15 West 6th Street, Suite 1000  
Tulsa, OK 74119  
Telephone: (918) 581-2885  
Email: robert.carlson@oag.ok.gov  
*Counsel for Plaintiff State of Oklahoma*

s/ Timothy D. Smith

Timothy D. Smith, WSBA No. 44583  
Senior Assistant Attorney General  
Antitrust and False Claims Unit  
Oregon Department of Justice  
100 SW Market St  
Portland, OR 97201  
Telephone: (503) 934-4400  
Email: tim.smith@doj.state.or.us  
*Counsel for Plaintiff State of Oregon*

s/ Jennifer A. Thomson

Jennifer A. Thomson (admitted *pro hac vice*)  
Senior Deputy Attorney General  
Pennsylvania Office of Attorney General  
Strawberry Square, 14th Floor  
Harrisburg, PA 17120  
Telephone: (717) 787-4530  
Email: jthomson@attorneygeneral.gov  
*Counsel for Plaintiff Commonwealth of Pennsylvania*

s/ Michael A. Undorf

Michael A. Undorf (admitted *pro hac vice*)  
Deputy Attorney General  
Delaware Department of Justice  
820 N. French St., 5th Floor  
Wilmington, DE 19801  
Telephone: (302) 683-8816  
Email: michael.undorf@delaware.gov  
*Counsel for Plaintiff State of Delaware*

s/ Christina M. Moylan

Christina M. Moylan (admitted *pro hac vice*)  
Assistant Attorney General  
Chief, Consumer Protection Division  
Office of the Maine Attorney General  
6 State House Station  
Augusta, ME 04333-0006  
Telephone: (207) 626-8800  
Email: christina.moylan@maine.gov  
*Counsel for Plaintiff State of Maine*

s/ Gary Honick

Gary Honick (admitted *pro hac vice*)  
 Assistant Attorney General  
 Deputy Chief, Antitrust Division  
 Office of the Maryland Attorney General  
 200 St. Paul Place  
 Baltimore, MD 21202  
 Telephone: (410) 576-6474  
 Email: Ghonick@oag.state.md.us  
*Counsel for Plaintiff State of Maryland*

s/ Katherine W. Krems

Katherine W. Krems (admitted *pro hac vice*)  
 Assistant Attorney General, Antitrust Division  
 Office of the Massachusetts Attorney General  
 One Ashburton Place, 18th Floor  
 Boston, MA 02108  
 Telephone: (617) 963-2189  
 Email: katherine.krems@mass.gov  
*Counsel for Plaintiff Commonwealth of Massachusetts*

s/ Scott A. Mertens

Scott A. Mertens (admitted *pro hac vice*)  
 Assistant Attorney General  
 Michigan Department of Attorney General  
 525 West Ottawa Street  
 Lansing, MI 48933  
 Telephone: (517) 335-7622  
 Email: MertensS@michigan.gov  
*Counsel for Plaintiff State of Michigan*

s/ Zach Biesanz

Zach Biesanz (admitted *pro hac vice*)  
 Senior Enforcement Counsel  
 Office of the Minnesota Attorney General  
 445 Minnesota Street, Suite 1400  
 Saint Paul, MN 55101  
 Telephone: (651) 757-1257  
 Email: zach.biesanz@ag.state.mn.us  
*Counsel for Plaintiff State of Minnesota*

s/ Lucas J. Tucker

Lucas J. Tucker (admitted *pro hac vice*)  
 Senior Deputy Attorney General  
 Office of the Nevada Attorney General  
 100 N. Carson St.  
 Carson City, NV 89701  
 Telephone: (775) 684-1100  
 Email: LTucker@ag.nv.gov  
*Counsel for Plaintiff State of Nevada*

s/ Andrew Esoldi

Andrew Esoldi (admitted *pro hac vice*)  
 Deputy Attorney General  
 New Jersey Office of the Attorney General  
 124 Halsey Street, 5th Floor  
 Newark, NJ 07101  
 Telephone: (973) 648-7819  
 Email: andrew.esoldi@law.njoag.gov  
*Counsel for Plaintiff State of New Jersey*

s/ Jeffrey Herrera

Jeffrey Herrera (admitted *pro hac vice*)  
 Assistant Attorney General  
 New Mexico Office of the Attorney General  
 408 Galisteo St.  
 Santa Fe, NM 87501  
 Telephone: (505) 490-4878  
 Email: jherrera@nmag.gov  
*Counsel for Plaintiff State of New Mexico*

s/ Zulma Carrasquillo-Almena

Zulma Carrasquillo (admitted *pro hac vice*)  
 Assistant Attorney General  
 Antitrust Division  
 Puerto Rico Department of Justice  
 P.O. Box 9020192  
 San Juan, Puerto Rico 00901-0192  
 Telephone: (787) 721-2900  
 Email: zcarrasquillo@justicia.pr.gov  
*Counsel for Plaintiff Commonwealth of Puerto Rico*

1 s/ Stephen N. Provazza

Stephen N. Provazza (admitted *pro hac vice*)  
2 Special Assistant Attorney General  
Chief, Consumer and Economic Justice Unit  
3 Department of the Attorney General  
150 South Main Street  
4 Providence, RI 02903  
Telephone: (401) 274-4400  
5 Email: sprovazza@riag.ri.gov  
*Counsel for Plaintiff State of Rhode Island*

6 s/ Sarah L. J. Aceves

7 Sarah L. J. Aceves (admitted *pro hac vice*)  
Assistant Attorney General  
8 Vermont Attorney General's Office  
109 State Street  
9 Montpelier, VT 05609  
Telephone: (802) 828-3170  
10 Email: sarah.aceves@vermont.gov  
*Counsel for Plaintiff State of Vermont*

11 s/ Laura E. McFarlane

12 Laura E. McFarlane (admitted *pro hac vice*)  
Assistant Attorney General  
13 Wisconsin Department of Justice  
Post Office Box 7857  
14 Madison, WI 53707-7857  
Telephone: (608) 261-5810  
15 Email: cooleygj@doj.state.wi.us  
*Counsel for Plaintiff State of Wisconsin*

## Appendix A

Competition Authorities					
Search Term	Hits	Hits Plus Family	Unique Hits	Unique Hits Plus Family	Unique Families
DG-Comp*					
AGCM					
Autorita Garante della Concorrenza					
bureau W/2 compet*					
Cartel Office					
Comision Federal de Competencia Economica					
"Competition and Markets Authority"					
CMA					
Competition Bureau					
Competition Commission					
Competition Tribunal					
Directorate-General W/5 competit*					
European Commission					
Italian Competition Authority					
BKartA					
Bunderskartellamt					
Cofece					
CompCom					
DG Comp* OR DMU					
Japan* W/2 Fair Trade Commission					
JFTC					

Regulatory Regimes					
Search Term	Hits	Hits Plus Family	Unique Hits	Unique Hits Plus Family	Unique Families
designated company					
Digital Markets Act					
Digital Markets Competition					
Ending Platform Monopolies Act					
GWB					
paramount significance for competition					
promot* W/2 platform compet*					
regulatory regime W/10 designated					
Sec. 19a					
strategic market status					
DMA					
DMCC					
Gatekeeper					